Chicago Tribune Company *and* Chicago Mailers' Union Local No. 2, affiliated with the Communications Workers of America, AFL–CIO–CLC.[1] Cases 13–CA–25944, 13–CA–27161, 13–CA–27336, and 13–CA–29166

July 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On September 21 1990, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed cross-exceptions and a supporting brief. All parties filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

[1] On January 1, 1987, the International Typographical Union became affiliated with the Communications Workers of America, AFL–CIO. Accordingly, the caption has been amended to reflect that change.

[2] In affirming the judge's finding that the Respondent violated Sec. 8(a)(5) by its delay in providing the Union with the names of strike replacements, we do not rely on: (1) the judge's references to the decision and reasoning of another judge in a different case which involves the Respondent and is still pending before the Board; (2) the judge's erroneous statement that in order to justify nondisclosure of strike replacements' names, the Respondent had to prove that the information would be misused; and (3) the judge's post hoc finding of significance in the absence of retaliation against replacements after the Respondent ultimately provided replacements' names to the Union on August 10, 1987.

Member Raudabaugh does not pass on whether he would require an employer to prove a ''clear and present danger'' to replacement employees in order to justify a refusal to provide their names to the union. In his view, the circumstances relied on by the judge, as modified herein, support the conclusion that the Respondent was required to supply the information even if a standard less than ''clear and present danger'' is applied.

[3] We affirm the judge's conclusion that the Union effectively accepted an outstanding contract offer from the Respondent and created a complete and binding collective-bargaining agreement on July 27, 1987. In this regard, we agree that the Union's acceptance was not invalidated by its failure to incorporate the Respondent's June 13, 1986 nondiscrimination clause counterproposal in signed copies of the contract or to refer to that clause in its acceptance letter. We find that the Respondent's own failure to make any contemporaneous reference to this omission is conclusive evidence that it did not believe there was any continuing bargaining dispute about the nondiscrimination clause. In particular, the Respondent's August 10, 1987 response to the Union's acceptance letter refers only to the Respondent's June 4, 1986 complete contract proposal. It does not even mention the proposed nondiscrimination clause.

[4] We find merit in cross-exceptions to the judge's failure to order remedial backpay for the 15 former strikers who rejected the Respondent's unlawful offers of reinstatement in December 1989. A make-whole remedy is the traditional relief provided by the Board to former strikers who refuse or do not respond to an offer of reinstatement invalid on its face and who were thereby denied their preferential right to be recalled to a vacant job. E.g., *Craw & Son*, 244 NLRB 241 (1979). Accordingly, we shall modify the recommended Order and substitute a new notice to provide for backpay to these 15 former strikers. Backpay shall be computed as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

We also find merit in cross-exceptions to the judge's finding that remedial reinstatement of the aforementioned 15 former strikers should, if necessary, displace 14 other former strikers who returned to work in jobs originally offered to the discriminatees. We leave to compliance the determination of which employees, if any, must be laid off in order to effectuate our reinstatement order.

Finally, we find no merit in the Charging Party's cross-exceptions to the judge's failure to recommend that the Respondent reimburse it for dues and initiation fees lost as a result of the Respondent's unlawful refusal to execute and enforce a collective-bargaining agreement containing a union-security clause. Such a remedy is inappropriate in the absence of a contractual checkoff provision. *Hickory Farms of Ohio*, 222 NLRB 418, 421 (1976).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(b).

''(b) Offer all 15 former economic strikers who refused unlawful offers of reinstatement in December 1989 immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Board's decision.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail to provide or unreasonably delay providing the Chicago Mailers Union No. 2 with the names of permanent strike replacements.

WE WILL NOT refuse to provide the Union with periodic payroll or other data for every payroll period from January 9, 1986, to the present, or any other information relevant and necessary to its role as exclusive bargaining representative.

WE WILL NOT poll employees, in the context of unremedied unfair labor practices, about whether or not they want the Union to represent them.

WE WILL NOT refuse to sign and implement the terms of the July 27, 1987 agreement between us and the Union.

WE WILL NOT refuse to recognize and bargain with the Union as the exclusive bargaining representative in the unit described in the agreement of July 27, 1987, and in previous bargaining agreements between us and the Union.

WE WILL NOT discriminate against employees because they engaged in strikes or other protected concerted activities by not offering them their former jobs or substantially equivalent jobs when vacancies occur in such positions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their Section 7 rights.

WE WILL sign and implement the terms of the July 27, 1987 collective-bargaining agreement between us and the Union, and WE WILL make whole all employees, including any who may have since left the payroll and reinstated former strikers, for any loss of wages or benefits suffered by reason of our failure to apply the agreement.

WE WILL offer all 15 former economic strikers who refused unlawful offers of reinstatement in December 1989 immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL furnish the Union with payroll or similar data for every payroll period from January 9, 1986, to the present, and with all the information requested by it in October 1987.

WE WILL, on request, bargain with the Union as the exclusive bargaining representative of the employees in the bargaining unit described above and, if an understanding is reached, embody the understanding in a signed agreement.

CHICAGO TRIBUNE COMPANY

Paul Bosanac, Esq., for the General Counsel.
R. Eddie Wayland and *E. Andrew Norwood, Esqs.*, of Nashville, Tennessee, for the Respondent.
Richard Rosenblatt, Esq., of Englewood, Colorado, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This consolidated case was originally tried for 4 days from December 11 through December 14, 1989, in Chicago, Illinois. It arises from the bargaining and consequent strike by unions representing separate units of Respondent's production employees in 1985 and 1986, but it involves only the unit represented by the Charging Party Union (the Union or the Mailers Union).[1]

The original consolidated complaint, as amended, alleges that Respondent violated Section 8(a)(5) and (1) of the Act by refusing and delaying to provide the Union with the names of the permanent replacements it had hired during the strike, and refusing to provide periodic payroll or other data that would show whether vacancies occurred to which former strikers could be recalled. The complaint also alleges that Respondent violated Section 8(a)(5) and (1) when it failed to sign an agreement entered into when the Union accepted Respondent's outstanding contract offer, Section 8(a)(1) when it later polled its replacement employees, and Section 8(a)(5) and (1) when it subsequently withdrew recognition from the Union. Finally, the complaint alleges that Respondent violated Section 8(a)(5) and (1) by failing to provide the Union with bargaining unit information after the withdrawal of recognition. The Respondent filed an answer denying the essential allegations of this complaint.

After the close of the hearing in the original proceeding, the General Counsel issued a complaint in a related Case (13–CA–29166) alleging that, in December 1989, the Respondent announced vacancies in the unit involved in the original case and that it violated Section 8(a)(3) and (1) of the Act by not making proper offers of reinstatement to former strikers with respect to those vacancies. The Respondent filed an answer denying this additional allegation. In an intermediate order, dated March 5, 1990, I directed that this case be consolidated with the earlier case which I reopened for this purpose. The hearing on the reinstatement portion of the case was held on June 26 and 27, 1990, in Chicago, Illinois.

The parties filed helpful briefs and reply briefs on all phases of the case. I have read and considered all of them.[2] Based on those briefs, the testimony of the witnesses, and my observation of their demeanor, as well as the documentary evidence, and the entire record herein, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Chicago, Illinois, is engaged in the publication of the Chicago Tribune, a daily newspaper, in Chicago, Illinois. It annually derives over $200,000 in gross revenues, subscribes to various interstate news services, including the Associated Press, and publishes various syndicated features. During a representative 1-year period, Respondent purchased and received, at its Chicago facility products, goods and services valued in excess of $50,000 directly from points outside the State of Illinois. Accordingly, I find, as Respondent admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] Two other units have had their own litigation over the strike or its aftermath. One is represented by the Chicago Typographical Union No. 16, Communication Workers of America. See JD–298–89, Case 13–CA–28307, December 12, 1989 decision of Judge Bernard Ries. Another is represented by Chicago Web printing Pressmen's Union No. 7, Graphic Communications International Union. See JD–292–89, Case 13–CA–25535, December 12, 1989 decision of Judge Marion Ladwig.

[2] I see no reason for not reading or considering anything submitted to me so I deny the General Counsel's motions to strike.

The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

1. Background: the bargaining, the strike, picketing, and the hiring of replacements

For many years the Union bargained with the Respondent through the Chicago Newspaper Publishers Association (CNPA), a multiemployer bargaining association of which Respondent was a member. The most recent bargaining agreement between the Union and CNPA was effective from April 15, 1981, through July 14, 1984. Thereafter, following a timely withdrawal from multiemployer bargaining, the Union began to negotiate individually with both Respondent and Chicago's other major daily newspaper, the Chicago Sun Times.

The Union, along with other unions representing Respondent's production employees whose contracts were also being negotiated at this time, struck the Respondent. The strike began in July 1985. The unions set up picket lines at Respondent's production facility; to a certain extent, the picketing was a coordinated effort by all the striking unions. The Respondent hired permanent replacements for the striking employees, including those in the bargaining unit involved here, referred to either as the mailroom or, later on, the packaging department.

There were numerous incidents of harassment, violence, and verbal abuse of replacements and supervisory personnel as they crossed the picket line outside the Respondent's production facility. Some 40 to 45 employees represented by four unions were disciplined for strike misconduct; 20 of these were mailroom employees, 5 or 6 of whom were discharged. Some of the violence and harassment carried over to the homes of Respondent's supervisors. In August 1985, Respondent received word that a list of mailroom supervisors had been posted on the Union's bulletin board at the Sun Times production facility. They had apparently been union members but resigned at the time of the strike. There was evidence that some mailroom supervisors received threatening phone calls, magazine, and pizza deliveries that had not been ordered, and had vandalism directed to their homes or property. One had his garage burned with damage to both his cars. Although some mailroom employees may have been involved in picket line misconduct, the perpetrators of the incidents at the homes of the supervisors were never apprehended or even identified and there is no evidence that the Union was responsible for this or any other misconduct. There is no evidence that Section 8(b)(1)(A) charges were filed against the Union in this respect or that union officials were involved in any misconduct, whether on or off the picket line.

2. The requests for the names of the replacements

The parties continued to negotiate during the strike. An issue arose at one point as to whether the striking employees would be entitled to return to work at the end of the strike. In one of the bargaining sessions, Union Counsel Marvin Gittler asked whether, if the Union accepted Respondent's last proposal, the strikers would be reinstated ''immediately.'' In a February 19, 1986 letter, George Veon, Respondent's vice president and director of industrial relations, said that they would not and that the strikers who unconditionally ended the strike would be returned to work in accordance with established law ''to the extent that any job vacancies have not been filled with permanent replacements.'' Under Board law, economic strikers who have made unconditional offers to return to work are entitled to their old jobs if they have not been permanently replaced and, even if they have been permanently replaced, when the permanent replacements leave or vacancies otherwise become available. See cases cited, infra.

On February 20, 1986, Union Counsel Gittler wrote to Respondent's Veon requesting certain information in connection with Respondent's claim that there were ''no vacancies'' in the mailroom. Gittler asked for the names of ''each employee allegedly hired on a permanent basis'' since the beginning of the strike, along with other information, such as the date of hire, job title, and pay rates of the replacements, as well as other information related to the permanence or duration of the jobs.

On March 6, 1986, Veon replied in a letter to the Union. He provided some of the information requested, such as rates of pay and hire dates of individuals identified as ''mailroom employee,'' but declined to provide the Union the names of the replacements ''due to the type and amount of violence connected with this strike, including actions against supervisors, who continue to work and are known by your members.'' Veon then stated, ''[p]lease let us know the reason you require the names so we can evaluate this further to determine if we can satisfy your purpose for this and still protect the employees.''

On March 25, 1986, Gittler responded by letter asking questions about the data provided and for more information, including whether any replacements had resigned or been terminated and the date of such action. On the issue of names, Gittler stated as follows:

> The name of each employee is essential to verify the validity of the material you have submitted and to assist in determining the status of the employees. Such names have been provided to other unions and there is no good reason to deny the request. . . . Please provide the names immediately.

He also questioned the Respondent's allegations of violence as a factor in withholding the names of the replacements.

Veon's response, dated April 8, 1986, provided some answers to Gittler's requests, including information as to the termination of some replacements as of that point. On the issue of names, it stated as follows:

> We do not believe there is a valid reason for you to have the names of the permanent replacements, but if there is a need to contact them we are willing to supply the names and addresses to a third party such as a major CPA firm and allow them to address and forward information or perform related tasks so long as the names and addresses are not revealed to anyone else.

On May 13, 1986, the Union filed a charge, in Case 13–CA–25944, alleging that Respondent had discriminated against employees in certain respects and had refused to fur-

nish requested information to the Union necessary for collective bargaining and representation of unit members.

At the May 28, 1986 bargaining session between the parties, Gittler told Respondent's negotiators that, if Respondent provided it with the names of replacements, the Union would not release the names and would use them only to verify information already provided. This was confirmed in a letter sent that same day to Veon. The letter states as follows:

> We further advised you as to the inadequacy of the information you provided to Local 2 under cover letter of April 8, 1986 and explained that the names of alleged replacements were necessary to verify the information you have submitted to determine those in the bargaining unit and to enable us to verify and administer a reinstatement list should all of the strikers not be permitted to return to work immediately. We indicated to you that although we have had a right to this information as a bargaining representative since we first requested the information, we would nevertheless agree not to disseminate the information beyond that which is necessary for the purposes expressed above. We also stated that the list would not be used to contact individuals at their homes.

On May 30, 1986, Veon wrote to the Union stating Respondent's understanding of the Union's need for the names: the Union did not need to contact the replacements directly, ''but only needs verification as to the accuracy of the list of persons hired as replacements which has been previously supplied to the union.'' He then made the following proposal:

> As an alternative to release of the names, the Company proposes to provide the list of replacements with their birth date and the last four digits of their social security numbers. This information should meet the verification needs of the union. At the same time it will prevent any liability on the part of your union should something happen to a replacement if the names were released.

There were no further communications between the parties on the issue of names until August 1987. In the meantime, on June 24, 1986, the General Counsel issued a complaint in Case 13–CA–25944 alleging that Respondent's failure to provide the Union with ''information concerning the names of strike replacements'' was violative of the Act. Because of the pendency of this unfair labor practice proceeding, and in accordance with standard procedure, the Board declined to process a decertification petition filed by a mailroom replacement employee on August 11, 1986.[3]

3. The unconditional offer to return to work and subsequent requests for periodic payroll or other data relating to the existence of vacancies

On May 25, 1986, the Union made an unconditional offer, on behalf of the striking mail room employees, to return to work. The Respondent stated that it had no vacancies in the mailroom. None became available, according to Respondent, until December 1989. As a result the mail room was manned only by replacements, and no former strikers, for the next 3-1/2 years.

From June through September 1986, the Union and Respondent exchanged letters relating to Respondent's proposed preferential hiring list for the return of the striking employees and the Union's attempt to secure information as to whether Respondent had any vacancies to which the former strikers could be recalled. The Union sought the information about vacancies in three separate letters to Veon from the Union's secretary-treasurer, Leonard A. Jedd:

On July 2, 1986, Jedd made the following request:

> [W]e hereby request that you provide us with a full and complete payroll or other listing of all employees employed in the mail room and performing duties within the Local 2 bargaining unit for each pay period since January 9, 1986. Such information will enable us to verify the legitimacy of your refusal to recall so much as one striking employee represented by this union.

On August 5, 1986, Jedd repeated his request:

> [W]e have still not received a response to our demand to inspect your payroll records for the purpose of investigating and/or verifying your hiring and/or employment of non-striking individuals. It remains inconceivable to us that there has not been one vacancy since our unconditional offer to return to work.

On September 2, 1986, Veon sent the Union a list of employees currently working in the mailroom with the classification (mailroom employee), hire date, and an indication whether the employee was full time or part time. Veon stated that ''[b]ased on current volume and productivity there are no vacancies at this time.''

On September 5, 1986, Jedd wrote Veon as follows:

> We are still awaiting the information we have repeatedly requested to verify your claim that there has not been one single vacancy in the mail room since our unconditional offer.

There was no further response to these requests by Jedd.

4. The Union accepts the Respondent's last offer and Respondent thereafter refuses to sign the contract proffered by the Union, polls the replacements, and withdraws recognition from the Union

Despite their differences, the Union and Respondent continued to meet and communicate in an effort to resolve these differences. The last bargaining session was held on August 18, 1986.

On June 6, 1986, the Respondent had sent the Union a copy of its then-updated bargaining proposal in the form of a draft collective-bargaining agreement.[4] This proposed contract, which had a duration clause of 2 years, was capable of being accepted at this point by the Union and the parties would then have had a full and complete bargaining agreement. The Union did not accept the proposal when it was

[3] At the hearing I reserved ruling on R. Exhs. 14, 15, and 16 dealing with its protest of this action. Upon reconsideration I reject those exhibits for the reasons stated by the General Counsel at the hearing.

[4] This proposal had apparently been made at the June 4, 1986 bargaining session of the parties.

made. However, the proposal was never withdrawn by Respondent.

On June 13, 1986, Veon had sent the Union a letter reviewing the negotiations to that point and including a counterproposal to an apparent Union proposal on equal employment. The Respondent's proposal read as follows:

> The Union and the Employer strongly and actively support an equal employment policy and this Contract will be applied accordingly. In accordance with applicable law, neither the Employer nor the Union shall discriminate in employment matters on the basis of race, color, religion, sex, national origin, ancestry, age, marital status, and physical or mental handicap unrelated to ability or unfavorable discharge from military service.

On February 16, 1987, the Union's newly elected president, Louis Lambesis, wrote John Sloan, Respondent's director of employee relations, congratulating him on his recent promotion and asking for a resumption of negotiations.

On March 2, 1987, William O. Howe, Respondent's labor relations manager, responded to the Lambesis letter describing his view of the negotiations to that point and referring to the Respondent's outstanding ''firm proposal'' which the Union had not accepted. Howe stated that ''[t]he Company has no change in its firm proposal,'' and said that the Union should let him know if it had a change of position.

On July 22, 1987, the Sun Times, which was then in negotiations with the Union, notified its employees represented by the Union that, pursuant to the most favored nations clause in its recently expired contract with the Union, it would cut the pay of those employees to the rate Respondent, its competitor, was paying the mail room replacement employees. This was reported in a story in Respondent's newspaper dated July 23, 1987. The Union disputed the Sun Times' interpretation of the most-favored nations clause and the proposed wage cut was never implemented.

On July 27, 1987, the Union wrote Respondent two letters accepting Respondent's ''most recent'' contract proposal and notifying Respondent that the Union was removing its picket line which had apparently remained in place since the beginning of the strike. The Union reaffirmed its position in a letter dated July 28, 1987, and, on August 6, 1987, Union President Lambesis wrote Howe notifying him that the employees had ratified the agreement and enclosing signed copies for Respondent's signature.

On August 10, 1987, Howe responded to the Union's letters declining to acknowledge the Union's acceptance of its contract offer. He stated that Respondent had a good-faith doubt of the Union's continued majority, setting forth its reasons. The reasons mentioned were as follows: (1) all of the former strikers were permanently replaced and none had been returned to work; (2) none of the replacements was a Union member and ''many'' expressed a desire not to be represented; (3) a decertification petition was filed with the Board in August 1986; (4) another petition signed by two-thirds of the replacements stated that they did not want to be represented by the Union; (5) the replacements had been harassed; (6) the Union had made demands that replacements be laid off and former strikers returned to work; and (7) the Union's acceptance of the Respondent's offer was motivated by the Union's ''situation'' at the Sun Times and was not in the interest of bargaining unit employees. The Respondent did not, however, withdraw recognition from the Union at this time.

In the letter Howe also stated that, ''[i]n order to insure the basis of our good faith doubt,'' Respondent was going to conduct a poll of its employees on August 20. The letter continued that Respondent was waiving its prior objection to providing the Union with the names of the replacement employees. Enclosed was a list of the names and addresses of all current employees as well as those replacements who were then working or had worked in the mailroom. The Union responded to this letter objecting to the proposed poll and standing by its position that the parties had an enforceable agreement.

On August 25, 1987, Howe wrote the Union announcing the result of the poll, conducted by an accounting firm, in what the Respondent called the ''Packaging Department (mail room).'' The Union was rejected by a wide margin. As a result, Howe concluded, Respondent was refusing to sign the proffered contract and was withdrawing recognition from the Union.

5. More requests for information from the Union

On October 8 and 13, 1987, the Union wrote Respondent eight separate letters requesting specific information with respect to administering the contract it contended had been agreed on in late July 1987. The Respondent, in a letter dated October 23, 1987, denied these requests stating that, in its view, the Union was no longer the legitimate bargaining representative and there was no valid agreement in existence.

6. In December 1989 the Respondent offers reinstatement to some former strikers to fill vacancies in the unit

As indicated above, on May 28, 1986, the Union had made an unconditional offer that the striking mailroom employees would return to work. On December 6, 1989, Respondent declared for the first time that vacancies existed in the unit and sent letters to 15 former strikers offering them reinstatement to jobs in the packaging department. These 15 names came from a preferential hire list prepared by the Respondent.

After the Union asked for more details on the offers, the Respondent specified the details in letters, with an attached fact sheet, both to the Union and the 15 former strikers, dated December 22, 1989. According to the fact sheet, the former strikers would be full time employees working five shifts each week, they would carry seniority from their original hire dates, and their hourly wage rate would be $9.91 for the first shift and $10.31 for the second and third shifts. The offer was for jobs on the second and third shifts.

None of the 15 former strikers initially offered jobs accepted Respondent's offer. Thereafter, Respondent went down its hire list and exhausted it; part-time former strikers were offered part-time positions and full-time former strikers were offered full-time positions. Fourteen former strikers accepted Respondent's offer and returned to work. All the reinstated former strikers were journeymen; night-shift journeymen were earning $14.3357 per hour before the strike. On reinstatement they were earning $10.31 per hour; some replacements were earning more than they were. The contract

accepted by the Union in late July 1987 provided that journeymen mailers be paid $15.70 per hour for night-shift work.

B. *Discussion and Analysis*

1. The prewithdrawal of recognition information requests

Paragraphs 8(a) and 9(a) and (b) of the complaint allege that from May 30, 1986, until August 10, 1987, Respondent refused to provide and delayed providing ''information concerning the names of strike replacements'' requested by Union Counsel Gittler on May 28, 1986. Paragraphs 8(b) and 9(c) allege that, since August 5, 1986, Respondent refused to provide ''a full and complete payroll or other listing of all employees employed in the mailroom and performing duties within [the Union's] bargaining unit for each pay period since January 9, 1986'' as requested on July 2, August 5, and September 5, 1986, by Union Secretary-Treasurer Jedd.

An employer's statutory duty to bargain in good faith includes an obligation to provide the union which is the exclusive bargaining representative of its employees with relevant and necessary information attendant to bargaining. *NLRB v. Acme Industrial Co*., 385 U.S. 432 (1967). The standard for determining relevance is a liberal discovery-type one. Id. at 437. It is well settled that the names of strike replacements are presumptively relevant and are required to be furnished to an incumbent union by an employer on request. *Burkart Foam*, 283 NLRB 351, 356 (1987), enfd. 848 F.2d 825 (7th Cir. 1988); *Georgetown Holiday Inn*, 235 NLRB 485 (1978). Unions are also entitled to information relating to the layoff and recall of employees, including the recall of strikers. *Burkart Foam*, supra, and cases there cited; *Florida Steel Corp*., 235 NLRB 941, 942 (1978); *Champ Corp*., 291 NLRB 803 (1988), enfd. 913 F.2d 639 (9th Cir. 1990). Finally, the failure to provide required information within a reasonable time is as much a violation as the refusal to provide it at all. *Georgetown Holiday Inn*, supra, 235 NLRB at 497–498, and *Pennco, Inc*., 212 NLRB 677, 678 (1974).

a. *The names*

Respondent takes the position that it was entitled to withhold the names because of its concern that their release would cause harm or harassment to the replacements. Respondent did release the names, as well as the addresses, which the Union had never requested, in connection with a poll it conducted among the replacements in August 1987, over a year after the original request. Such a concern–that replacements would be harmed by release of requested information–may justify refusing to provide requested information where, as the Seventh Circuit has stated, an employer shows a ''clear and present danger that the union will use the information to harass employees.'' *NLRB v. Burkart Foam*, 848 F.2d 825, 833 (7th Cir. 1988). Resolution of this issue requires weighing competing interests in the circumstances of each case. See *WCCO Radio v. NLRB*, 844 F.2d 511, 515 (8th Cir. 1988), cert. denied 109 S.Ct. 72 (1988), quoting from *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 314–315 (1979), and *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1094 (1st Cir. 1981).

In this case, consideration of all the circumstances leads me to conclude that the prospect that the names would be used for retaliation was not sufficiently strong to outweigh the Union's right for the names in the context of its rather limited request and needs. Thus, Respondent has not shown a clear and present danger that the names would be misused by the Union.

There is no doubt that there were incidents of violence and harassment in the strike of the several unions against Respondent. However, the question is not whether there was violence or even how much, but whether there was a clear and present danger that the names provided to the Union would be used to advance such violence, or, more precisely, whether Respondent refused to provide the names to the Union because it reasonably believed there was a clear and present danger that the names would be used to harm the replacements. It is appropriate, in this case, to focus primarily on the incidents away from the picket line at the homes of the mailroom supervisors. Release of the names would have no appreciable effect on picket line misconduct or harassment, mostly in the form of verbal abuse, since the replacements were confronted, regardless of whether their names were known, because they physically crossed the picket line as they went to and came from work. The question then becomes would the names be used by the Union to obtain other information—addresses and phone numbers—which would bring the misconduct and harassment to the homes of the replacements. I think not. Nor do I think Respondent seriously thought they would.

The request for the names came from the Union's attorney with the stated need being verification of information already provided. The Respondent knew and understood the limited purpose for the names. Despite Respondent's failure to ask for assurances against misuse of the names, a circumstance itself casting doubt on whether Respondent really believed that there was a clear and present danger of misuse, the Union's attorney nevertheless volunteered such assurances. Attorney Gittler wrote Respondent that the Union would not ''disseminate the information beyond [verification]'' and stated that the information would ''not be used to contact individuals at their homes.'' This assurance was at least as specific and effective as that found sufficient to allay employer concerns in *Burkart Foam*, supra, 848 F.2d at 834.

There is always the possibility that the names could have fallen into the wrong hands, namely the hands of those who were responsible for the violence and harassment of the mailroom supervisors at their homes, and, if that happened, it would be a short step for them to have gone to a telephone directory to obtain addresses and phone numbers. However, I consider this eventuality remote in this case. It is significant that neither the Union nor its officers were found responsible for any of the violence or harassment, including that which occurred at the homes of supervisors. And they were the ones who were most likely to see and use the names for verification purposes. Even assuming that some hot headed members were responsible for the incidents at the homes of supervisors, it is as likely as not that this was a result of the fact that these supervisors were former union members who were viewed as traitors to the cause. More importantly, and not meaning to condone whatever misconduct occurred, in the absence of a finding, or even a charge or complaint, under Section 8(b)(1)(A) of the Act, that the Union was responsible for it, I cannot conclude that the Union or its officers would use the names for this purpose.

Compare *Browne & Sharpe Mfg. Co*., 299 NLRB 586 (1990).

It seems to me that Respondent must show that the information would be misused, not simply that it might be misused. Because neither the Union or its officers were shown to have been responsible for the misconduct which occurred, I cannot accept Respondent's position that it could not trust the Union's assurances against misuse. There was, here, no reasonably based objective ground to discount the Union's assurances and the Respondent ''has not shown the Union to be unreliable in respecting confidentiality agreements.'' *Pertec Computer*, 284 NLRB 810, 811 (1987). See also *WCCO Radio v. NLRB*, supra, 844 F.2d at 515.[5]

Another factor tending to show no clear and present danger of misuse in this case is the Respondent's action in turning over the names, as well as the addresses, which the Union never requested, in August 1987. Significantly, there is no evidence of retaliation or harm to the replacements at any time after the names and addresses were provided. Perhaps it could be argued that the violence and harassment had abated by the time Respondent turned over the names and addresses. But neither the Respondent nor its witnesses took this position and abatement of the misconduct was not the reason given for release of the names and addresses. In its reply brief (R. Br. 5), Respondent states that it ''had safety concerns'' when it released the names and addresses; indeed, Respondent's director of security testified that he thought providing the names to the Union in August 1987 was a negligent act. Respondent nevertheless dismissed these alleged safety concerns and, according to the testimony of Labor Relations Manager Howe, released the names and addresses in an effort to revive the stalled decertification election petition. I have difficulty accepting this testimony, and indeed Respondent's rationale on this entire matter, because there was no way that release of the information at this late date would have unblocked the decertification petition filed in August 1986.[6]

However, even if I did accept Howe's testimony and Respondent's rationale, it would simply mean that only when faced with the possibility of a 2-year contract with the Union was the Respondent willing to supply the names it had withheld for over a year in hopes that an election would be held which would oust the Union. This belies Respondent's alleged safety concerns and undercuts its position that it withheld the names because of a clear and present danger that the Union would use the names to harm the replacements.[7]

In its reply brief (R. Br. 5), the Respondent attempts to explain its change of position with respect to release of the names by asserting that it was simply following the wishes of the replacements: in early 1986 the replacements did not want their names released, but, in August 1987, they did, in hopes of getting an opportunity to oust the Union. Two replacements, leaders in the decertification movement, and several management officials testified to this effect; the views of the replacements were expressed in meetings called by management. I cannot accept Respondent's explanation. The argument itself proves too much. If fears that the names would be misused could be dissipated simply by a promised, but essentially ineffective, opportunity to oust the Union they could not have been significant fears to begin with. Whatever representations were made in those meetings, as I noted above, release of the names in August 1987 would not have unblocked the decertification petition, nor was such release necessary to legitimize the poll contemplated by Respondent.

Thus, I cannot give this testimony controlling weight. Much depends on the context of the employee meetings in which the replacements' views were expressed. It is not entirely accurate to say, as Respondent contends in its reply brief, that the replacements asked Respondent to release the names in August 1987. Respondent called the meetings and told the replacements that it was thinking of releasing the names and, presumably, the addresses. Respondent initiated discussions on this issue because, as Howe testified, Respondent thought—erroneously, it turned out—that disclosure at this point would clear the way for a decertification election. It is not even clear that all the replacements agreed to release of their names. Mailroom Supervisor Jim Strafaci testified that, in group meetings in 1986, the replacements said they did not want their names released and he never heard them say otherwise. In these circumstances, it is likely that the views of the replacements were not entirely independent from the views of the Respondent; they were influenced by what Respondent wanted to do. After considering all of the testimony on this point, as well as Respondent's own interests in the matter, I do not think I would have confidence in the validity of any findings I could make about the true feelings of the replacements.

In any event, it seems to me that Respondent's clear and present danger defense can be resolved notwithstanding this testimony. As the Eighth Circuit has stated, the views of employees on matters of confidentiality—concerns equivalent to those involved here—are not dispositive, particularly where, as here, the union gives assurances limiting the use of potentially damaging information. See *WCCO Radio v. NLRB*, supra, 844 F.2d at 515.

A similar release of names issue was considered by Judge Ladwig in the *Tribune Pressmen's* case. In that case, which

[5] Respondent's contention that it declined to provide the names in reliance on the General Counsel's refusal to issue a complaint in a similar case involving Chicago Typographical Union No. 16 is unavailing. The General Counsel's refusal to issue a complaint on this point in that case was based on the union's failure, unlike the Union here, to give assurances against misuse of the names and addresses requested in that case. The same General Counsel did issue the complaint in this case as well as in the *Chicago Tribune Co. (Pressmen's)*, 304 NLRB 287 (1991), case on this point.

[6] The election had been stalled by Respondent's own failure to release the names of the replacements. And Respondent, which was at all times represented by experienced labor counsel, should have known that an untimely release would not cure the alleged violation that had blocked the election. As indicated above, delay in supplying required information is as much a violation as refusing to provide it in the first place (see cases cited, supra). Moreover, Respondent should have recognized that refusing to sign the contract proffered by the Union (discussed, infra) would at least prompt another charge, as it did, which would keep the election blocked.

Nor is there any labor law requirement that an employer provide names and addresses of replacements before polling them. In a case decided in September 1989, well after the events herein, the Board set forth a requirement that a union, at least an incumbent, be given reasonable advance notice of a poll. *Texas Petrochemicals Corp*., 296 NLRB 1057 (1989). The Board did not require that names and addresses be provided before such a poll because it would be superfluous: an incumbent union has a right to this information anyway.

[7] Even if the abatement of violence argument were advanced by Respondent it would not provide a defense in this case. There has been no showing, for example, that there was less violence and harassment on August 10, when Respondent provided the names, than on July 26, the day before the Union accepted the outstanding proposal and a point at which the Respondent was still refusing to provide the names.

is pending before the Board, Judge Ladwig found a violation where the Respondent had refused to provide both the names and addresses of replacements in part because the Respondent ''had no real fear'' that release of this information would present a ''clear and present danger'' of harassment. I considered some of the same evidence considered by Judge Ladwig. Indeed, much of the evidence herein was in the form of testimony and exhibits in that case entered into this record by stipulation. I do not adopt Judge Ladwig's findings on this point because of the differences in the two cases. However, there are similarities which point to the same result here. Indeed, this case is stronger because here, unlike in that case, the Respondent did eventually provide the names, as well as the addresses, to the Union in circumstances which belied any clear and present danger due to the release of the names. Nor did the union in the *Pressmen's* case give the assurances made by the Union herein.

I acknowledge that Respondent suggested what appeared to be reasonable alternatives to release of the names in light of the Union's stated verification needs. The instant case is thus distinguishable from the *Pressmen's* case on this point, infra. In other circumstances Respondent's suggested alternatives might have carried the day and provided a complete defense. Not here however. The presence of this factor does not counterbalance the other evidence herein which shows no clear and present danger that the Union would use the names to harass the replacements. The request for the names was for a very limited purpose, neither the Union nor union officials who would have access to the names were involved in any alleged misconduct, the Union gave assurances against misuse of the names, and the Respondent belied any safety concerns by later providing the names as well as the addresses. No evidence of misuse followed release of the names. In these circumstances, I believe that the Union's presumptive right to the information sought was not overcome by Respondent's reasons for withholding the information. I do not believe that Respondent has convincingly shown a clear and present danger that the Union would use the information sought to retaliate against replacements. Accordingly, I find that Respondent's delay of over 1-year in providing the Union with the names of replacements which it needed for legitimate verification purposes was violative of Section 8(a)(5) and (1) of the Act.

b. *The periodic payroll or other data*

Now to the second information allegation. In an amendment to the original complaint the General Counsel alleges that Respondent unlawfully refused and failed to honor three requests, in June, August, and September 1986, from the Union for continuing payroll data that would show whether any vacancies occurred after the end of the strike which could be filled by former strikers who had offered to return to work and thus had reinstatement rights.

Respondent conceded that, at no time, did it ever provide the specific payroll information requested by the Union, namely, ''a full and complete payroll or other listing of all employees employed in the mailroom and performing duties within the [Union's] bargaining unit for each pay period since January 9, 1986.'' However, it took the position that it considered this another request for the names of replacements and that all other requested payroll data had been provided.

I disagree and find that this information was necessary for the Union to carry on its basic representative function. The Union needed this information to monitor whether any vacancies had occurred among the replacements because, absent legitimate and substantial business reasons, former strikers who unconditionally offer to return to work are entitled to be recalled to fill vacancies as they arise. See *Burkart Foam*, supra, 848 F.2d at 831, citing the lead cases on the point. Information on terminations, layoffs or resignations, transfers, if any, or hours worked, including overtime, is crucial in determining whether a vacancy exists. Periodic payroll information is the raw data which can highlight the existence of a vacancy. In this case, Respondent repeatedly denied that vacancies existed; the Union was entitled to information which would enable it to test this claim, much as a union is entitled to information which would enable it to test an employer's claim of inability to pay certain wages. See *NLRB v. Truit Mfg. Co*., 351 U.S. 149, 152–153 (1956).

Significantly, in the *Pressmen's* case, Judge Ladwig found that the evidence before him established that Respondent failed to fill certain vacancies, despite its contention that none existed, in derogation of the rights of former strikers. Without the raw data showing the ebb and flow of the work force in each payroll period the Union could not adequately monitor possible vacancies and thereby properly represent its members who sought to return to work. Indeed, its failure to press for this information might well have subjected it to a fair representation suit. See *Vaca v. Sipes*, 386 U.S. 171 (1967). Respondent's failure to supply the Union with periodic payroll or other data in order to determine whether or not vacancies existed was thus prima facie violative of the Act. Respondent has offered no persuasive defense to its failure to provide this information.

Contrary to Respondent's position, this allegation does not deal with another request for the names of replacements. This allegation involves a much broader request which had a different origin than the request for the names. The request for the payroll data was spawned by three letters from the Union's secretary-treasurer *after* the Union ended the strike and former strikers became entitled to recall rights when vacancies arose. The request for names was spawned by letters from attorney Gittler *before* the end of the strike in connection, originally, with the Union's attempt to obtain immediate reinstatement for the strikers. At this point, the Union was questioning whether all the strikers had been replaced and whether the replacements were permanent. Later, when some information was provided, the Union needed the names to verify the information provided. Thus, despite some similarity in the reasons advanced for the information, the requests were different. The request for periodic payroll data was different than that for the names because it sought a continuing, moving picture of employment as it might reveal the existence of vacancies. Indeed, the payroll data—from each payroll period—could have been provided even without the names, as Respondent had done with other information in connection with Gittler's request.

Respondent's contention that it had already provided the information requested by Jedd is not supported by the evidence. Labor Relations Manager Howe admitted that payroll or similar data by payroll period was not provided. An analysis of the information that was provided confirms this testimony. On March 6, 1987, the Respondent provided a list

identifying individual replacements by their classification, ''mailroom employee,'' their hourly rate and their date of hire. On April 8, 1986, Respondent sent the Union another copy of the same list with the designation part time or full time next to the unnamed individuals. In addition, the Respondent sent the Union a listing of replacements, again unnamed and classified ''mailroom employee,'' who had been terminated as of that point, together with their status (full or part time), date of hire, and date terminated. This list included 13 individuals who had been terminated in March and early April 1986. On September 2, 1986, Respondent sent the Union a list of then current employees listed by the designation ''mailroom employee,'' date of hire, and full-time or part-time status. No list of terminations was included at this time. No further information was provided to the Union until August 1987 shortly before Respondent withdrew recognition from the Union when lists of names were provided. Clearly, no continuing and periodic payroll or other similar data was provided.

In summary, Respondent failed to provide periodic payroll or other data which would show whether Respondent's claim that no vacancies existed to which former strikers could be recalled was correct. The raw data was not provided. Accordingly, I find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide full, complete and periodic payroll, or other data for every payroll period after January 9, 1986.[8]

2. The legality of Respondent's refusal to sign the contract allegedly created when the Union accepted the Respondent's last contract proposal and its subsequent poll and withdrawal of recognition

The General Counsel alleges that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign the contract which was created when the Union, on July 27, 1987, accepted Respondent's then outstanding contract proposal. If the facts support the existence of a contract at this point Respondent's refusal to sign it was violative of the Act. See *H. J. Heinz v. NLRB*, 311 U.S. 514 (1941).

Common law rules of contract law do not necessarily apply to collective bargaining which operates under statutory requirements of mutual good faith. The Board and the courts have held that the common law rule that a rejection or counterproposal terminates an offer has little relevance in the collective-bargaining setting. Thus, in collective bargaining, an offer will remain on the table—capable of acceptance—unless the offeror explicitly withdraws it or changed circumstances would lead both parties reasonably to believe that the offer was withdrawn. See *NLRB v. Burkart Foam*, 848 F.2d 825, 830 (7th Cir. 1988), and cases there cited, all approving what I will describe as the Board's *Pepsi-Cola* rule set forth in *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87, 89–90 (8th Cir. 1981), enfg. 251 NLRB 187, 189 (1980). See also *Williamhouse-Regency of Delaware*, 297 NLRB 199 (1989).

In the instant case, the parties bargained through August 1986 and the Union thereafter continued to seek information on the replacements and whether any vacancies had occurred which would entitle former strikers to return to work. The Union was pressing its position in a pending unfair labor practice proceeding, and, as I have found, it was entitled to certain information which Respondent had unlawfully refused and failed to provide it. The Respondent's latest complete offer, dated June 6, 1986, had never been withdrawn. On March 2, 1987, in a letter to the Union from Labor Relations Manager Howe, Respondent renewed its last offer, stating that it had ''no change in its firm proposal.'' In this letter Respondent also invited the Union to notify it if it had any change in its position. About 4 months later, on July 27, 1987, the Union unconditionally accepted the Respondent's outstanding offer. Although on the witness stand, Howe hedged on whether Respondent's ''firm proposal'' remained outstanding up until the time it was accepted, he conceded that it was not withdrawn or conditioned before the Union accepted it. I reject Howe's testimonial doubts as to the efficacy of the offer as self-serving, litigation-inspired and contrary to clearly stated written positions reflected in the documentary evidence. The Union's acceptance of the outstanding proposal 4 months after it was renewed was well within what could be considered reasonable under applicable case law. For example, in *Burkart Foam*, supra, acceptance came 5 months after the offer was made, and in *Presto Casting Co. v. NLRB*, 708 F.2d 495, 497–498 (9th Cir. 1983), cert. denied 464 U.S. 994 (1983), acceptance came within 1 month but after two counteroffers had been refused and the employer had withstood a strike.

There were not in this case sufficient changed circumstances, in the 4-month period between renewal of the outstanding offer and its acceptance, which would have led both parties reasonably to conclude that Respondent's offer was withdrawn. First of all, it is well settled that ''a mere change in bargaining strength'' does not constitute sufficient changed circumstances to vitiate an outstanding offer where the employer has done nothing to withdraw it. See *Pepsi Cola Bottling Co. v. NLRB*, supra, 659 F.2d at 90 and *Presto Casting Co. v. NLRB*, supra, 708 F.2d at 498. Respondent was, at this time, represented by experienced labor counsel. It knew it was perfectly free to withdraw the offer, or, indeed, if the facts warranted, withdraw recognition—which it later did—at any time before acceptance of its outstanding offer. It did not do so.

In its first communication with the Union after the latter's acceptance of the Respondent's offer, on August 10, 1987, Respondent declined to acknowledge the existence of a contract and, although it did not even then withdraw recognition, it listed some factors which it alleged gave it a good-faith doubt of the Union's majority status. Significantly, however, all of those factors, save one, related to the views of replacement employees and were present and known at the time, in March 1987, when Howe renewed Respondent's contract offer and invited the Union's response. These were not changed circumstances. Respondent could have relied on these factors in March to withdraw the offer; it did not. The other factor mentioned in the August 10 letter—the Union's ''situation'' at the Sun Times—had nothing to do with the Union's majority status at Respondent's facility. Although the threatened Sun Times wage cut was a recent occur-

[8] At the hearing, Respondent objected to the propriety of the amendment encompassing this allegation on procedural grounds. Respondent contended that the subject matter of the amendment was arguably embodied in a withdrawn charge and was not itself supported by a separate valid charge. I overruled the objection and reaffirm my ruling here. The amendment was closely related to an existing charge and one which had resulted in the issuance of a complaint. See *NLRB v. Sonicraft, Inc.*, 905 F.2d 146 (7th Cir. 1990).

rence—having been publicly revealed some 4 or 5 days before the Union's acceptance of the Respondent's offer—it was not a changed circumstance which would have led both parties to believe that Respondent was withdrawing its offer. The Union contested the Sun Times' interpretation of their most-favored nations clause and the Sun Times did not go through with the threatened cut. This circumstance did not directly affect the Respondent's unit, as Respondent concedes when it argues, infra, that the Union's acceptance was inoperative because it was motivated by nonunit considerations. It certainly did not lead both parties to believe that the offer was withdrawn; one party let it stand and the other accepted it. There is thus no reason to view the Respondent's offer as having been withdrawn by silence. Indeed, the only relevant changed circumstance here appears to have been the Union's acceptance of Respondent's offer. Accordingly, I find that there was no objective evidence from which it could reasonably be concluded that Respondent's offer was withdrawn by changed circumstances.[9]

Thus, in accordance with settled authorities, I find that the parties reached agreement on a full and complete contract on July 27, 1987, and the Respondent's refusal to acknowledge, sign, and live up to that contract was violative of Section 8(a)(5) and (1) of the Act. It follows from this finding, as well as the other findings I have made with respect to the unlawful failure to provide and delay in providing information to the Union, that Respondent's August 20, 1987 poll and its August 25, 1987 withdrawal of recognition from the Union, based on the poll results, were also violative of the Act—Sections 8(a)(1) and 8(a)(5) and (1), respectively—because they were undertaken in a context of unfair labor practices. See *Struksnes Construction Co*., 165 NLRB 1062, 1063 (1967) (a required element for a valid poll is that it not have been conducted in the context of unfair labor practices); *Texas Petrochemicals Corp*., supra, 296 NLRB at 1061 fn. 19 (same); *Utility Tree Service*, 215 NLRB 806, 807 (1974), enfd. 539 F.2d 718 (9th Cir. 1976) (employer not free to refuse to bargain with an incumbent union where agreement has been reached before it withdrew recognition); *North Bros. Ford*, 220 NLRB 1021, 1022 (1975) (same).

Respondent's defense to the allegations in this part of the case is basically threefold: (1) even though it did not withdraw recognition until after the Union accepted its outstanding offer, it had a good-faith doubt of the Union's majority at that point; (2) the Union's acceptance of the offer was invalid because its motive was to benefit people other than unit employees; and (3) the offer, as accepted, did not include an antidiscrimination provision which had been offered separately by Respondent. None of these defenses are persuasive or sufficient to defeat the findings of violation here.

The Respondent's first point is variously described as its not having a ''duty to sign the proposal'' or not being legally permitted ''to sign a contract with a minority union'' (Br. 62, 67). But it boils down to this: Respondent doubted the Union's continued majority because all of its members had been replaced and none had been reinstated and the replacements did not want the Union to represent them. Whatever the validity of this position in other contexts,[10] it cannot succeed where, as here, the alleged doubts are not given expression to the Union in the form of an explicit or even implicit withdrawal of recognition prior to the reaching of a contract. Respondent cannot have it both ways: it is either in a bargaining relationship, with the statutory duty to negotiate agreements in good faith, or it is not.

There is no reliable authority for the proposition that an employer may invoke a refusal to bargain or withdrawal of recognition after a contract has been reached. Good-faith doubt is a difficult enough concept to litigate when alleged doubts are expressed in the form of a refusal to bargain; it would be an impossible concept to litigate if it could be invoked after a contract is reached and in the absence of a prior refusal to bargain not only to vitiate that contract but to dissolve the bargaining relationship. This would permit an employer to litigate an alleged doubt as it might have existed in his own mind at the time a contract was reached rather than at the time of an objective event, that is, a refusal to bargain or withdrawal of recognition. The cases do not permit such a subjective inquiry. They speak in terms of the doubt as it existed at the time of the refusal to bargain or withdrawal of recognition, not at some earlier unspecified point. See, e.g., *Adams & Westlake, Ltd. v. NLRB*, 814 F.2d 1161, 1168 (7th Cir. 1987); *NLRB v. Gulfmont Hotel Co*., 362 F.2d 588, 589 (5th Cir. 1966); *Robinson Bus Service*, supra.

This is why the focal point of the inquiry in cases such as this is not whether or when alleged doubts of majority existed at some point prior to a refusal to bargain, but, rather, whether changed circumstances existed to vitiate an outstanding contract offer which was accepted prior to the refusal to bargain. As I have said above, none of Respondent's reasons for refusing to acknowledge the contract amounted to the requisite changed circumstances. The simple fact here is that Respondent sought to withdraw recognition after a contract had been reached. This it cannot do. The Board has consistently rejected similar attempts to negate contracts based on belated expressions of alleged doubts of majority. See, in addition to *Utility Tree Service*, supra, and *North Bros. Ford*, supra, *Bennett Packaging Co*., 285 NLRB 602, 608 (1987), and *Belcon, Inc*., 257 NLRB 1341, 1346–1347 (1981).

In this connection, Respondent relies heavily on two circuit court rulings, *Bickerstaff Clay Products Co. v. NLRB*, 871 F.2d 362 (11th Cir. 1989), cert. denied 110 S.Ct. 292, and *Curtin Matheson Scientific, Inc. v. NLRB*, 859 F.2d 362 (5th Cir. 1988). Both of these cases reversed the Board and

[9] The changed circumstances prong of the *Pepsi-Cola* test should not be confused with changed circumstances which would insulate an employer from bad faith or surface bargaining violations when it *actually* withdraws or changes an outstanding offer. If, for example, an employer weathers a strike or otherwise survives the economic confrontation attendant to collective bargaining, it may lawfully ''regress,'' as Respondent puts it in its brief (Br. 78), without violating the law. See, e.g., *Atlas Metal Parts Co. v. NLRB*, 660 F.2d 304, 309 (7th Cir. 1981). However, as *Pepsi Cola* and *Presto Casting*, supra, clearly hold, such changes in bargaining strength do not vitiate an outstanding offer. This simply highlights the obvious: Respondent could have withdrawn its outstanding offer; significantly, in this case, it did not.

[10] An incumbent union enjoys a presumption of continued majority—albeit a rebuttable one—at the expiration of a collective-bargaining agreement or at the end of the certification year. See *Barrington Plaza & Tragniew, Inc*., 185 NLRB 962, 963 (1970), enf. denied 470 F.2d 669 (9th Cir. 1972); *Robinson Bus Service*, 292 NLRB 70 (1988). Thus, an employer may dissolve a bargaining relationship based on something less than an actual loss of majority if it has an objective, reasonably based good-faith doubt of majority. However, the simple fact that a strike has occurred and strikers have been permanently replaced is not enough, in and of itself, to dissolve a bargaining relationship, as the Supreme Court has recently affirmed. *Curtin Matheson Scientific, Inc*., 110 S.Ct. 1542 (1990).

permitted the employer to withdraw recognition and disavow a contract after the union accepted an outstanding offer based to some degree on the views of strike replacements. To the extent that those cases relied on a rejection of the Board's refusal to adopt a presumption that strike replacements oppose an incumbent union, they have no validity after the Supreme Court, on April 17, 1990, reversed the Fifth Circuit's *Curtin Matheson* decision. On remand from the Supreme Court the Fifth Circuit issued an order enforcing the Board's underlying decision and order in *Curtin Matheson Scientific, Inc*., 864 F.2d 791 (5th Cir. 1990). The underlying decision of the Board which was thereby approved, and which offers further support for my findings herein, is reported at 287 NLRB 350.

What remains of *Bickerstaff* does not support Respondent. On the point pertinent to the instant case, *Bickerstaff* approved and applied the Board's *Pepsi-Cola* rule, but disagreed with the Board's application of the rule on the facts of that case. Thus, the Court found, contrary to the Board, that changed circumstances in that case would have led the parties reasonably to believe that the employer's offer was withdrawn. The Court noted that, between the time of the employer's last offer and the union's acceptance of it some 3 months later, the union was ''totally inactive''; the business agent had resigned nearly four months before; the union's elected officials had been removed from office; and an unfair labor practice charge had been filed against the union alleging that it failed to properly represent its members. Thus, the Court concluded that the union had ''effectively abandoned its role as the representative of the unit employees.'' 871 F.2d at 993.

The instant case is distinguishable on its facts. The Union had not abandoned its role as representative of the employees. As difficult as that role had become in the face of the hiring of permanent replacements, the Union was still the bargaining representative for both the former strikers, who remained employees with certain reinstatement rights, and the replacements whose names were being withheld from it. The Union continued to exist, to assert its bargaining rights, to picket in support of its bargaining position, and to press information requests even to the point of a pending unfair labor practice proceeding before the Board. Moreover, it had recently sought to jump-start negotiations. Prior to the Union's acceptance of the Respondent's outstanding contract offer, Respondent did not treat the Union as having abandoned its representative status and there is no evidentiary support in this record for the Board to treat it any differently.

Even assuming, contrary to Board precedent, that Respondent could invoke its alleged doubts of majority as changed circumstances after the Union's acceptance of its outstanding contract offer, it is not clear that the Respondent could rely on such doubts in this case. Respondent undercut the Union's bargaining status by committing other violations with respect to the Union's legitimate information requests. Thus, Respondent's asserted doubt of majority was not made in a context free of unremedied unfair labor practices. See *North Bros. Ford*, supra, 220 NLRB at 1022.

The Respondent also contends that the Union's acceptance of its offer was somehow invalid because allegedly the Union was acting simply to benefit its members at the Sun Times and not in the interest of unit employees (Br. 69–70). This contention is completely without merit. I am unaware of any authorities permitting an inquiry into the motives of either an employer or a union when one accepts, rather than rejects, the contract offer of the other. The Board usually limits such inquiries. See *Newtown Corp*., 280 NLRB 350, 351 (1986), enfd. 819 F.2d 677 (6th Cir. 1987) (employer may not raise internal union ratification procedures as defense to signing an agreement); *Teamsters Local 251 (McLaughlin & Moran)*, 299 NLRB 30 (1990) (same principle applies to unions). To inquire into the motives of contracting parties who accept proposals would create endless possibilities for protracted litigation which would ultimately destroy collective bargaining. As the Board has stated in another context, ''[i]f collective bargaining is to work, the parties must be able to formulate their positions and devise their strategies without fear of exposure.'' *Berbiglia, Inc*., 233 NLRB 1476, 1495 (1977).

Employers and unions accept contract offers for a myriad of reasons, including as assessment of their own bargaining strengths and weaknesses. Sometimes employers insist that they need concessions to bring wages and costs in line with those of competitors and unions agree; at other times unions use wage gains in other bargaining units to argue that employers should pay more and employers agree. Under our present system, no one expects Government to scrutinize the reasons for such agreements even though nonbargaining unit considerations may have entered into those decisions. The important thing is that the acceptance of an offer be unconditional and binding. Here there is no doubt that the Union unconditionally accepted the Respondent's outstanding offer and bound itself to the terms of the contract which, of course, applied to the Respondent's mail room employees, not those of the Sun Times.

Moreover, it is not accurate to state, as Respondent suggests, that the Union was not looking out for the interests of the employees it represented. In the last analysis it is for the employees and its representatives, not the employer, to determine what is in the best interests of the employees. However, here, there is no doubt on that score. The contract accepted by the Union immediately lifted the pay of the strike replacements by at least $5 per hour; and it guaranteed an increase to former strikers upon their recall. Even assuming that the Union was concerned that the Sun Times would cut the pay of their mail room employees, something that never happened, it is more realistic to view the Union's acceptance of the Respondent's contract offer as a recognition that Respondent's continued operation without a contract was eroding the wage standards of all of the employees represented by the Union, including those working for Respondent. The Union's action was thus not only not a conflict of interest, but was in aid of the mutual interest of all the employees it represented.

None of the cases cited by Respondent on this point support its position. For example, in *Standard Oil Co*., 137 NLRB 690 (1962), enfd. 322 F.2d 40 (6th Cir. 1963), the Board found that the union had violated Section 8(b)(3) of the Act by refusing to execute contracts agreed on at three locations until an agreement was reached at a fourth location. Likewise in *NLRB v. Retail Clerks Union Local 648*, 203 F.2d 165, 170 (9th Cir. 1953), the court affirmed the Board's finding that the Union violated Section 8(b)(3) by improperly conditioning its agreement on a contract involving clerks to negotiations involving supervisory employees. In contrast,

here, no charges of unlawful bargaining were filed against the Union and the Union attached no conditions to its acceptance of Respondent's offer. Nor do the conflict of interest cases cited by Respondent (Br. 75–77) apply here. The Union did not have an ownership interest in another employer or otherwise compete with Respondent or its agents. In short, there is no recognized authority for the Respondent's position.

Finally, Respondent contends that the Union's acceptance of its proposal did not include an antidiscrimination clause which Respondent had submitted to the Union separately one week after the all-encompassing proposal of June 6, 1986, and the Union accepted only the June 6 proposal. The Respondent's position is not well taken. It may be fairly inferred that the Union meant to include the antidiscrimination clause even though it only referred to the June 6 proposal and it only signed that proposal without also including the antidiscrimination clause. The Union's initial acceptance letter referred to Respondent's ''most recent'' offer and there is no evidence that the Union had ever objected to the antidiscrimination clause which bound both Respondent and the Union to what is essentially existing law on equal employment. Nor did Respondent even mention this apparent oversight when it contested the Union's acceptance of its offer on August 10, 1987.

Even assuming, however, that the Union mistakenly failed to refer to the antidiscrimination clause when it accepted Respondent's otherwise complete contract proposal, this does not defeat the finding that an enforceable bargaining agreement was reached. The antidiscrimination clause was not controversial and simply reflected the requirements of existing law. Indeed, Labor Relations Manager Howe conceded that the parties were bound by the provisions of this clause by operation of law even though it did not appear in the parties' last contract. The Respondent proposed the clause and the Union apparently does not object to its inclusion in the contract. In all other respects the Union accepted a full and complete bargaining proposal with such substantive terms such as recognition, wages, hours, benefits, and duration. This was certainly an agreement on all material terms of a collective-bargaining agreement. The Board has held that the finding of a binding agreement stands even though all details have not been resolved so long as all material terms are agreed upon. See *Timber Products Co*., 277 NLRB 769, 770 (1985), and cases cited therein at fn. 6; *Fashion Furniture Mfg*., 279 NLRB 705, 706 (1986).

One other point. It is not true, to paraphrase Respondent's complaint, that none of this would have happened if the Board had processed the decertification petition and held an election in August 1986 (see Br. 101).[11] The Board's so-called ''blocking charge rule'' is well settled and accepted by the courts even though it has been criticized in some quarters for being applied mechanically. See *Michael Bishop v. NLRB*, 502 F.2d 1024 (5th Cir. 1974). Respondent had it within its own power to ''unblock'' the decertification petition by providing the names which it would have had to do anyhow prior to any election (see *Excelsior Underwear*, 156 NLRB 1236, 1240 (1966)), and which it did after the Union accepted its contract offer, in an untimely purported effort to unblock the election. Even apart from the Board's application of its blocking charge rule, which is beyond my authority to deal with in this decision, the Respondent had ample authority to withdraw recognition, if it had the evidence to do so, or withdraw its contract offer, if it had the inclination to do so, prior to the Union's acceptance of its contract offer. It did not for reasons known only to it. Respondent does not advance its cause by blaming the Board for putting it in a position where its contract offer was accepted by the union with which it was bargaining.

[11] Significantly, the former strikers, none of whom had been reinstated at this point, would not have been eligible to vote in the election had it been held because more than 1 year would have passed since the beginning of the strike. See Sec. 9(c)(3) of the Act.

3. The postwithdrawal information requests

The Respondent does not contest the allegation that it failed to provide information which was clearly relevant to the Union's bargaining needs in October 1987, except to argue that it no longer was required to bargain with the Union and had no valid contract with it. In view of my disposition of these issues contrary to the Respondent's position, I find that Respondent's failure to provide this information to the Union was violative of Section 8(a)(5) and (1) of the Act.

4. The legality of the reinstatement offers in December 1989

The General Counsel contends that Respondent violated Section 8(a)(3) and (1) of the Act by offering to fill vacancies in December 1989 with improper offers of reinstatement to former strikers. The General Counsel focuses on the pay offered to the former strikers and urges a violation under three alternative theories: (1) assuming the existence of a contract as of July 27, 1987, the reinstatement offers were considerably less than the contract rate; (2) assuming no contract but a continued obligation to bargain, the former strikers were offered less than their wages at the time of the strike; and (3) assuming that no contract existed and that Respondent properly withdrew recognition, the reinstatement offers were not to former or substantially equivalent jobs, as required under applicable law, because the offers to experienced former strikers placed them considerably lower on the pay scale than strike replacements who had much less experience and seniority. In view of my disposition of the first part of this case, I need not reach alternatives (2) and (3). I find that Respondent's offers of reinstatement were unlawful because they contemplated that the former strikers would earn considerably less that the contract wage to which they and all other employees were entitled under the agreement entered into on July 27, 1987.[12]

There is no dispute that the former strikers made an unconditional offer to return to work and some vacancies existed to which they were entitled to return. It is also undisputed that the jobs to which they were recalled were their

[12] Should I be reversed on this point the evidence is in the record for alternative findings to be made on remand. There are certain other issues, such as the propriety of the preferential hire list utilized by Respondent to make the recalls, how many vacancies existed in this case, and the exact amount of the backpay with respect to the unlawful recalls, which may be resolved, if necessary, at the compliance stage of this case. In addition, the Charging Party has reserved the right to argue, in any future proceeding, that the information which it was unlawfully denied might reveal, when it is studied, a greater number of vacancies than Respondent declared or some at earlier points in time.

old jobs or ones substantially equivalent to their old jobs, except insofar as their pay and benefits were less than both those called for in the July 27, 1987 contract and those which obtained before the strike.

Economic strikers, such as the former strikers here, remain employees even though they are replaced and must be reinstated, on application, when their previous or substantially equivalent positions become available, absent legitimate and substantial business considerations. *Associated Grocers*, 295 NLRB 806 (1989), citing *NLRB v. Fleetwood Trailer Co*., 389 U.S. 376 (1967), and *Laidlaw Corp*., 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

Since the Respondent was bound to apply the July 27, 1987 contract to all employees, any deviation therefrom with respect to former strikers would constitute an unlawful unilateral change. See *NLRB v. C & C Plywood Corp*., 385 U.S. 421 (1967). The Respondent's wage offer to the former strikers was more than $5 less than the contract hourly wage rate; even under Respondent's own documentary evidence comparing wages and benefits, the wage and benefit package offered to the former strikers was over $3 per hour less than the package in the July 27, 1987 contract. In these circumstances, I find that Respondent's offer to the former strikers was not to their former or substantially equivalent jobs and was therefore unlawful. See *Hayden Electric*, 256 NLRB 601, 605 (1981), enf. denied on other grounds 693 F.2d 1358 (11th Cir. 1982).

Respondent has offered no defense to the allegation under this theory of the case, except for the somewhat lame argument that, under the management rights clause of the July 27, 1987 agreement, it was entitled to make certain changes in working conditions without bargaining with the Union. Putting aside for the moment whether such an argument should be available to a party which has refused to apply any part of the agreement, nothing in the management rights clause cited by Respondent vitiated the contract provision regarding pay as it applied to the returning former strikers. Section 9 of the July 27, 1987 contract provides that the night shift rate for journeymen is $15.70 per hour; section 23 defines journeymen as ''[p]ersons who, prior to the effective date of this Agreement, worked as journeymen in the mailroom.'' There is no dispute that the returning former strikers were journeymen. Accordingly, I find that, by failing to offer the former strikers the wage rates in the applicable contract, Respondent failed to offer them full reinstatement to their former or substantially equivalent jobs in violation of Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By failing and unreasonably delaying to provide the Union with the names of permanent strike replacements, Respondent violated Section 8(a)(5) and (1) of the Act.

2. By refusing to provide the Union with a full and complete payroll or similar data for every pay period since January 9, 1986, Respondent violated Section 8(a)(5) and (1) of the Act.

3. The Respondent and the Union reached a complete and binding collective-bargaining agreement on July 27, 1987.

4. By refusing to sign, apply or give effect to the July 27, 1987 agreement, Respondent violated Section 8(a)(5) and (1) of the Act.

5. By polling replacement employees in the context of the violations set forth above, Respondent violated Section 8(a)(1) of the Act.

6. By withdrawing recognition from the Union in the context of the violations set forth above and after a valid collective-bargaining agreement had been reached, Respondent violated Section 8(a)(5) and (1) of the Act.

7. By refusing to provide the Union with necessary and relevant bargaining information requested in October 1987, Respondent violated Section 8(a)(5) and (1) of the Act.

8. By failing to make proper offers of reinstatement to the former jobs or substantially equivalent jobs of former economic strikers for vacancies which arose in December 1989, Respondent violated Section 8(a)(3) and (1) of the Act.

9. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.[13]

Since the Respondent has failed to implement the terms of the July 27, 1987 bargaining agreement, it shall be ordered to sign that agreement and give effect to its terms retroactively to July 27, 1987. In addition, the Respondent shall be required to make whole all employees, including any who may have left its payroll, for any losses of wages or benefits suffered by reason of Respondent's failure to give effect to the agreement. The wages and benefits, including those due recalled former strikers, are to be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Since Respondent's offer with respect to the December 1989 vacancies in the unit was unlawful, it must offer those vacancies at the proper contract rate of pay to the former strikers in a nondiscriminatory manner. The refusal of some former strikers to accept unlawful offers of reinstatement does not remove them from the employer's preferential recall list. *Associated Grocers*, supra. Thus, all the former strikers on the list must be given the opportunity to fill vacancies by virtue of a lawful offer of reinstatement. In this respect, the General Counsel alleges that I should order backpay for the first 15 former strikers on Respondent's preferential hire list. I will not do so because that would be punitive. Nor can I prevent the 14 reinstated former strikers from being displaced in a renewed offer of reinstatement, as the General Counsel suggests. These 14 reinstated former strikers may not have been recalled at all had proper offers been made to former strikers higher on the list than they. Accordingly, and in order to return the situation as close to the status quo ante as possible, I shall order Respondent to make renewed offers of reinstatement for the December 1989 vacancies, as well as new offers for any vacancies which have occurred or will occur thereafter, on the basis of a nondiscriminatory recall list of former strikers, displacing not only the 14 former

[13] Because Respondent did eventually provide the Union with the names of the replacements there is no need for an affirmative remedy for this specific violation.

strikers that were recalled as a result of the unlawful offers of reinstatement, but also any other employees hired or transferred into the unit since December of 1989.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Chicago Tribune Company, Chicago, Illinois, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and unreasonably delaying to provide the Union with the names of permanent strike replacements.

(b) Refusing to provide the Union with periodic payroll or other data for every payroll period from January 9, 1986, to the present, that is, the date of compliance with this order, or any other information relevant and necessary to its role as exclusive bargaining representative.

(c) Polling employees, in the context of unremedied unfair labor practices, about whether or not they want the Union to represent them.

(d) Refusing to sign and implement the terms of the July 27, 1987 agreement between it and the Union.

(e) Refusing to recognize and bargain with the Union as the exclusive bargaining representative in the unit described in the agreement of July 27, 1987, and in previous bargaining agreements between the parties.

(f) Discriminating against employees because they engage in strikes or other protected concerted activities by not offering them their former jobs or substantially equivalent jobs when vacancies occur in such positions.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Sign and implement the terms of the July 27, 1987 collective-bargaining agreement between it and the Union, making whole all employees, including any who may have since left the payroll and reinstated former strikers, for any loss of wages or benefits suffered by reason of the failure to apply the agreement as set forth in the remedy section of this decision.

(b) Offer immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights, to all former strikers, on a nondiscriminatory basis, for all vacancies which arose in December 1989 and which may have occurred or will occur thereafter, without regard to whether such former strikers turned down previous offers of reinstatement, displacing, if necessary, the 14 former strikers who accepted offers of reinstatement as well as any other employees hired or transferred into the mailroom or packaging department unit after December 1989.

(c) Furnish the Union with payroll or similar data for every payroll period from January 9, 1986, to the present, and with all the information requested by it in October 1987.

(d) On request, bargain with the Union as the exclusive bargaining representative of the employees in the bargaining unit described above, and, if an understanding is reached, embody the understanding in a signed agreement.

(e) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at its production facility in Chicago, Illinois, copies of the attached notice marked ''Appendix.''[15] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[14] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''